No. 355

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CLAUDE VERNON COOPER - - - - - - *Petitioner*

vs.

ELIZABETH D. COOPER - - - - - - *Respondent*

REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition to the petition fails to meet the central issue in the case.

Rule 38, Paragraph 5(a), of the Rules of this Court, indicates that a petition for certiorari will be favorably considered:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

It was, and is petitioner's contention that the decision of the Court of Appeals of Kentucky in this case either ignore or misapplies the doctrine of Magnolia Petroleum Company v. Hunt, 320 U.S. 43, 88 L.

ed. 149, 64 S. Ct. 208. The Hunt case, following a long line of similar discussions, held that the Full Faith and Credit Clause of the Federal Constitution compels a state court to give the same force and effect to a judgment of a sister state as would be given by the courts of such sister state. The Florida cases cited in our petition for certiorari make it clear beyond all doubt that Mrs. Cooper could not have recovered alimony from Mr. Cooper in the State of Florida after Mr. Cooper obtained his decree of divorce from her. And, at the risk of repetition, we state once more that Mrs. Cooper, though a resident of Kentucky, voluntarily appeared and contested the right of Mr. Cooper to a divorce up through the highest court of Florida. Thus, the Florida judgment, to which the Kentucky Court of Appeals did not accord full faith and credit, was a valid personal judgment and in no wise *ex parte*.

These contentions cannot be controverted. Indeed, distinguished counsel for respondent has not sought to controvert them. Instead, he has injected into the case, belatedly, issues which do not belong here, and which have no possible bearing on the matter now presented at his bar.

Two of these matters may be summarily disposed of: First, no question has been raised with respect to the jurisdiction of the Kentucky courts. Therefore, the discussion at the bottom of page 5 of the respondent's brief is entirely beside the point. Granting that the Kentucky courts possessed jurisdiction, they were under constitutional compulsion to exercise that jurisdiction in accordance with the Full Faith and Credit Clause of the Federal Constitution. The mere fact that a court proceeds by way of attachment does not relieve it of the duty to obey the Constitution. Second, the discussion of Mr. Cooper's conduct toward and relations with Mrs. Cooper on pages 9 and 10 of respondent's brief has no place here. The merits of that question are not before this Court. The Flor-

ida courts considered all of those issues; and the present question is whether the Kentucky courts had the power to ignore the judgment of the Florida court and reconsider them.

Only two statements are made in respondent's brief which bear upon the case in its present posture. These contentions deserve brief consideration:

1. Respondent contends that petitioner is precluded from challenging the judgment now in issue by his failure to seek relief in this Court from the judgment rendered by the Court of Appeals on the first appeal in 1950. The judgment of the Court of Appeals of Kentucky rendered on the first appeal on May 26, 1950, was not a final judgment (R. 592). The court in such judgment only found that the Florida divorce judgment did not constitute a bar to the right of the respondent to prosecute an action for alimony, and reversed the judgment with directions to the lower court "to hear proof as to the question of alimony" (R. 592.) The Court of Appeals of Kentucky in such judgment did not find or adjudge that the respondent was entitled to recover alimony of the petitioner. Such judgment made no final disposition of the case. The effect of the order reversing the judgment dismissing the petition and remanding the case with directions "to hear proof as to the *question* of alimony" was to direct a trial of the question of alimony. Such question involved (1) a determination of the right of respondent to alimony, and (2) the amount of alimony, if she be found entitled to alimony. These questions were judicial. Moreover, any judgment rendered by the Perry Circuit Court, pursuant to such remand, awarding alimony to respondent, was subject to review by the Court of Appeals. Thus, the judgment rendered on the first appeal lacked the basic elements of finality (Gospel Army v. Los Angeles, 331 U.S. 543, 91 L. ed. 1662, 67 S. Ct. 1428; Department of Banking v. Pink, 317 U.S. 268, 87 L. ed. 257, 635 S. Ct. 233.)

Subsequently, the Perry Circuit Court found that respondent was entitled to recover alimony, and adjudged that she recover of petitioner alimony in the sum of $125,000.00 and the life use of the family home (R. 768.) Thus, although the Court of Appeals had held on the first appeal that the Florida divorce decree did not bar a prosecution by the respondent of her claim for alimony, any denial of the federal right asserted by petitioner must of necessity result from the direction on the second appeal of the entry of a judgment requiring him to pay alimony.

The fact that the Court of Appeals of Kentucky on the second appeal declined to reconsider the force and effect to be given the Florida divorce decree does not deprive the Supreme Court of jurisdiction to review the judgment rendered (Louisiana Navigation Co. v. Oyster Commission, 226 U.S. 99, 57 L. ed. 138, 33 S. Ct. 78; Urie v. Thompson, 337 U.S. 163, 93 L. ed. 1282, 69 S. Ct. 1018; United States v. United States Smelting Co., 339 U.S. 186, 94 L. ed. 750, 70 S. Ct. 537.)

2. Respondent asserts that "the cases were prepared and practiced on the tacit, if not expressed, agreement that the divorce action would be tried in Florida and the alimony and property rights adjudicated in the Kentucky case."

Respondent's contention is unsupported by the record and finds no basis in either of the opinions of the Kentucky Court of Appeals. Indeed, respondent never asserted before the Kentucky courts that such an agreement existed, although petitioner pleaded the Florida decree as a defense to respondent's alimony action immediately after its rendition.

The only agreement ever made related simply to the mechanics of the case, and by this agreement the depositions taken in the Florida case were made a part of the record in the Kentucky case (R. 25.)

If such an agreement as respondent asserts was ever entered into, it is incredible that its existence should have been unnoticed by both the respondent and the Kentucky courts throughout these proceedings.

It is true that the Florida court made no express adjudication of the property rights of the two parties. But, Mrs. Cooper was before the court and, if she had seen fit to do so, could have sought alimony in the Florida action. Under the Florida law, the failure to do so, when she had the chance, precluded her from raising the question at a later date (*Carson* v. *Oldfield*, 99 Fla. 862, 127 So. 851.) And if she was shut off in Florida, she was shut off in Kentucky—by the Full Faith and Credit Clause of the Federal Constitution.

Petitioner urges that the writ issue.

Respectfully submitted,

LESLIE W. MORRIS
MARION RIDER
Counsel for Petitioner